UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARAKELIAN ENTERPRISES, INC., d/b/a ATHENS SERVICES, Respondent, -and- **INTN'L BHD OF TEAMSTERS, LOCAL 396,** Charging Party.	Cases: 31-CA-223801 31-CA-226550 31-CA-232590 31-CA-237885

RESPONDENT'S ANSWERING BRIEF TO THE COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Respondent Arakelian Enterprises, Inc. d/b/a Athens Services' ("Athens"),[1] by and through its attorneys Epstein Becker & Green, P.C., and pursuant to Section 102.46 of the National Labor Relations Board's ("Board") Rules and Regulations, hereby files its Answering Brief to the Counsel for the General Counsel's ("General Counsel") Exceptions to Administrative Law Judge Jeffrey D. Wedekind's ("ALJ," "ALJ Wedekind" or "Judge Wedekind") Decision in cases 31-CA-223801, 31-CA-226550, 31-CA-232590, and 31-CA-237885.[2] As described below, Athens respectfully requests that the Board dismiss the Exceptions and adopt the ALJ's findings that: (1) Athens did not violate Section 8(a)(1) of the National Labor Relations Act ("Act") by disciplining Jose Maldonado for a no-call/no-show attendance violation; (2) Athens did not create an unlawful impression of surveillance in violation of Section 8(a)(1) of the Act on July 12, 2018; (3) Athens did not unlawfully surveil employees' union activities on August 2, 2018 in violation of Section 8(a)(1) of the Act; (4) Athens did not violate Sections 8(a)(3) or 8(a)(1) of the Act when it allegedly closed the Training Room; and (5) Athens did not fail to engage in decisional bargaining in violation of Section 8(a)(5) of the Act after it allegedly closed the Training Room. Additionally, Athens respectfully requests that the Board affirm the ALJ's well-reasoned findings that the 8(a)(1) violations committed on July 2, 2018 did not evidence union animus or discriminatory intent.

[1] Athens has been providing waste collection and recycling services in Southern California for over 60 years. Founded in 1957, Athens began as a small family-run business. Athens is still a family-run company today, but it now employs nearly 1,600 employees Companywide and has grown into one of the largest independent (non-national) waste collection companies in the Los Angeles area with a significant percentage of the City of Los Angeles ("City" or "Los Angeles") market share. Tr., 2118:3-5 (Torres); Jt. Ex. 1, No. 1.

[2] Hereinafter "ALJD" refers to pages of the Administrative Law Judge Decision, JD(SF)-45-19; Tr." refers to the pages of the Official Transcript of Hearing; "GC Ex." refers to the General Counsel's Exhibits; "Er. Ex." refers to the Athens' Exhibits; and "Jt. Ex." refers to the Joint Exhibits.

I. INTRODUCTION.

This case involves a series of meritless blocking charges filed by the Union transparently designed to delay employees' right to have decertification elections.[3] Specifically, pursuant to a card check under the parties' Labor Peace Agreement,[4] the Union represents three separate bargaining units, one unit for Athens' Pacoima Yard, Sun Valley Yard and Torrance Yard respectively (collectively LA Yards). On July 6, 2018, employees from each of the LA Yards filed separate decertification petitions in Case Nos. 31-RD-223309, 31-RD-223335, 31-RD-223318. In response, the Union filed charge 31-CA-223801 the next week to block the petitions. The Union then proceeded to amend and file additional charges for the next 8 months, successfully continually pushing back a resolution of the block. In August of 2019, the ALJ presided over a 10-day hearing. On December 29, 2019 the ALJ issued a well-reasoned 51-page Decision dismissing almost all of the allegations, largely based on credibility determinations.

The General Counsel filed exceptions related to several of the ALJ's dismissals and findings related to the Pacoima Yard.[5] The General Counsel's exceptions attack the ALJ's well-reasoned and well-supported factual findings and credibility determinations and urges the Board to overturn these findings based on discredited witness testimony and baseless conjecture unsupported by the record evidence. Each of these exceptions should be rejected and the Board should adopt the ALJ's Decision.

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[3] *See* Athens' Request for Extraordinary Relief and Request for Review filed on February 21, 2020 in Case Number 31-RD-223309 for more information.

[4] As detailed in Athens' post-hearing brief and ALJ Wedekind's decision, the City of Los Angeles passed an ordinance that required Athens to enter into a "labor peace agreement" with the Union in order to keep a substantial portion of its existing business in the City of Los Angeles. *See* ALJD, pp. 1-2. Athens Post-Hearing Brief, pp. 3-5, Section II(B).

[5] While the Union separately filed exceptions related to dismissals of allegations related to the Sun Valley and Torrance Yards, the General Counsel has not.

First, the General Counsel contends the ALJ erred in finding Athens legitimately disciplined Jose Maldonado for an attendance violation. However, it is undisputed that Jose Maldonado committed the infraction for which he was disciplined, and ALJ properly disregarded Jose Maldonado's testimony regarding animus based on Maldonado's demeanor, the substantial inconsistencies in his testimony, and his admissions on cross examination. Although the General Counsel urges the Board to overturn the ALJ's demeanor-based credibility resolution concerning Jose Maldonado, the General Counsel failed to meet the high burden imposed on a party advocating such reversals. Other than Jose Maldonado's discredited testimony, the General Counsel's only evidence of animus were two minor 8(a)(1) violations. However, consistent with the undisputed record evidence, the ALJ properly found these violations occurred due to a misunderstanding, not because of animus. Accordingly, the ALJ properly dismissed this allegation.

Second, the General Counsel contends the ALJ erred in finding Athens did not create an unlawful impression of surveillance on July 12, 2018. However, Jose Maldonado, who was the sole General Counsel witness to testify about this allegation, was thoroughly discredited on cross-examination, and the ALJ properly discounted his testimony. Even more significant, the alleged statement could not reasonably create an impression of surveillance because it did not reveal detailed knowledge of secret union activities. To the contrary, even under the General Counsel's theory, the alleged statement at best referenced activities openly conducted in public in plain view of anyone working at Athens. As such, employees could not reasonably believe their activities had been placed under surveillance, and the ALJ properly dismissed this allegation.

Third, the General Counsel contends the ALJ erred in finding Athens did not unlawfully surveil employees' union activities on August 2, 2018. However, as the ALJ correctly found,

Athens actions were in response to the Union's own substantial misconduct; specifically, the record evidence, including a video, shows the Union surreptitiously trespassed onto Athens' property after hours, refused to leave, and entered an off-limit work area despite being explicitly and repeatedly told not to. Under Board law, these circumstances privileged Athens to observe the Union's unlawful and unauthorized actions, and the ALJ properly dismissed this allegation.

Fourth, the General Counsel contends the ALJ erred in finding Athens actions related to the Training Room were not taken in response to Union activity. As the ALJ correctly found, though, the record plainly indicates the Company's actions were in response to the Union's trespass and its unauthorized use of a work area to conduct Union business. Athens subsequent actions related to the Training Room were not grossly disproportionate to the Union's misconduct, and there was no other evidence of animus. Thus, the ALJ properly dismissed this allegation.

Fifth, the General Counsel contends the ALJ erred in finding Athens failed to bargain over the decision to "close" the Training Room. However, the ALJ properly found that the extenuating circumstances of the Union's trespass, its unauthorized use of the Training Room, and its manifest intent to continue its unauthorized use of the Training Room despite management's directives – justified Athens' actions without first providing notice and an opportunity to bargain.

Finally, although the ALJ sustained two minor 8(a)(1) allegations, both of which arose from the same isolated incident on a single day in July, the General Counsel urges the Board to disavow the ALJ's findings that these were unintentional gaffes born out of an innocent misunderstanding. However, Judge Wedekind based these findings on the undisputed record evidence and demeanor-based credibility resolutions, and other than rank speculation, the General Counsel has not presented any other explanation grounded in record evidence for these unprecedented actions. Accordingly, the ALJ's findings are proper and should not be disavowed.

II. ANALYSIS IN SUPPORT OF ALJ WEDEKIND'S FINDINGS.

A. Athens Legitimately Disciplined Jose Maldonado for an Attendance Violation.

The record evidence proves Athens legitimately disciplined Jose Maldonado for an attendance violation, and there was no evidence of animus or retaliatory intent. However, even if there had been such evidence, Athens would have taken the same action in the absence of protected activity. Thus, the General Counsel's Exception 1, including Exceptions 1(a) to 1(k), are without merit.

1. Relevant Facts.

a. Tire Mechanic Saturday Schedule in 2018

In 2018, there were two tire mechanics at the Pacoima Yard: Jose Maldonado and David Maldonado. Tr., 109:10-15 (J. Maldonado), 248:8-11 (D. Maldonado). The tire mechanics, like all Shop employees, worked a six-day a week, Monday through Saturday, schedule. ALJD, 7:26-8:2; Tr., 115:13-116:9, 125:15-25 (J. Maldonado); 1740:13-17, 1758:22-1759:5 (Martorana); Er. Ex. 19. Nevertheless, if the workload on a Saturday was manageable, and one of the tire mechanics wanted to take the Saturday off, then Jose and David Maldonado could arrange among themselves for only one tire mechanic to work on Saturday. ALJD, 7:26-8:2; Tr., 62:18-21, 115:13-116:9, 120:1-8, 124:6-125:25, 243:3-10 (J. Maldonado); 318:5-16, 319:15-18, 320:2-14, 322:22-323:5 (D. Maldonado). However, it was their responsibility to arrange for Saturday coverage if either intended to take a Saturday off. *Id.* And as both tire mechanics admitted at the hearing, there was no formal rotating Saturday schedule, and the default rule was that Jose and David Maldonado both were expected to work Saturday unless they notified management of their absence pursuant to Company policy. *Id.*

b. Athens Company Event in May 2018.

On Saturday, May 19, 2018, Athens held an open-house event for the employees and their families at the Pacoima Yard. ALJD, 5:45-6:4; Tr., 1743:19-25 (Martorana). The event was held in the Shop, so the Company had to alter the Saturday schedule for the Shop employees that day. ALJD, 5:45-6:4; Tr., 1744:3-8 (Martorana).

In advance, Mark Martorana, the Shop Manager, gave the Shop employees the choice to either work on Saturday after the event or on Sunday morning. ALJD, 5:44-6:7; Tr., 326:2-327:20 (D. Maldonado), 1744:3-1749:8 (Martorana); Er. Ex. 20; Er. Ex. 21. Martorana first presented this choice to employees at a weekly safety meeting about a month before the event on April 12, 2018, and again at the weekly safety meeting on May 10, 2018, when a majority of employees voted to work Saturday instead of Sunday. *Id.* Once the schedule was set, Martorana let everyone know that he needed "all hands on deck" that Saturday, meaning he expected all Shop employees, including both tire mechanics, to work the Saturday after the event. Tr., 1749:16-1750:11 (Martorana).

After the employees voted to work Saturday, though, former supervisor Eric Zufall allegedly told the Shop employees they would have to work Sunday instead. ALJD, 6:6-18. This upset the employees, who had just voted to work Saturday, so Jose Maldonado went to Martorana's office with a few other employees, including David Maldonado, and asked, "So we're working this Saturday, Mark?" ALJD, 6:6-18; Tr., 334:1-13, 335:16-336:14 (D. Maldonado), 1751:3-6 (Martorana). In agreement, Martorana responded that, pursuant to their majority vote, the Shop employees would work Saturday. ALJD, 6:6-18; Tr., 1752:1-5 (Martorana)("I said 'Yes, Jose, the majority wanted Saturdays, so that's what we're going to do.'")

Importantly, Jose and David Maldonado admitted, consistent with Martorana's testimony, that Martorana was not upset, angry, or disturbed by Jose Maldonado's inquiry. ALJD, 7:19-24; Tr., 1752:12-18 (Martorana); 130:5-24, 131:16-20, 137:14-138:4, 143:14-17 (J. Maldonado); 338:1-13 (D. Maldonado). Rather, he quickly and without objection confirmed that they would be working Saturday after the event.[6] ALJD, 7:19-24; Tr., 1752:3-5 (Martorana); 70:12-13, 137:19-23 (J. Maldonado); 337:23-338:3 (D. Maldonado).

c. Jose Maldonado Was Properly Disciplined for a No-Call/No-Show.

On May 19, 2018, the day of the Company event, a number of employees, including Jose and David Maldonado, failed to show up for work. ALJD, 6:20-27; Tr., 1584:6-1587:24 (Ramirez); 1753:8-13 (Martorana); GC Ex. 2; Er. Ex. 15. Accordingly, there was no tire mechanic coverage on this day. Tr., 1753:11-13, 1759:15-19 (Martorana). Martorana checked with the supervisors to see if the absent employees called in prior to their shift pursuant to Athens policy, and, on May 22, 2018, he issued a verbal warning to each employee who did not. ALJD, 6:20-27; Tr., 1584:6-1587:24 (Ramirez), 1753:14-1755:23 (Martorana); Er. Ex. 15

With respect to the tire mechanics, Martorana issued the verbal warnings to Jose and David Maldonado. Tr., 1754:13-1755:23 (Martorana); GC Ex. 2; Er. Ex. 15. Martorana met with David Maldonado first. ALJD, 6:27-28; Tr., 1756:12-22 (Martorana), 343:16 (D. Maldonado). At no point during the meeting did David Maldonado mention it was his Saturday to work. ALJD, 6:27-28, 8:12-15; Tr., 269:21-22; 343:13-22; 344:7-9 (D. Maldonado), Tr., 1754:13-1755:23 (Martorana).

[6] Jose Maldonado also admitted Martorana could have ordered the employees to work Sunday instead of Saturday. Tr., 136:22-24 (J. Maldonado). However, from the first moment he knew about the Open House and its impact on employees' schedule, Martorana left the choice of which day to work up to the employees.

When Martorana met with Jose Maldonado to issue his verbal warning, Jose Maldonado claimed that it was his day off. ALJD, 6:29-35, 8:8-12; Tr., 1757:8-1758:13 (Martorana). Martorana responded that he expected all Shop employees to work that Saturday, but nevertheless, in response to Jose Maldonado's statements, checked the timekeeping system, which showed Jose Maldonado did not work the last three consecutive Saturdays. ALJD, 6:29-35; Tr., 1757:8-1758:13 (Martorana). After Jose Maldonado reviewed these time records, Jose Maldonado said he must have made a mistake and signed his discipline form without further question or protest.[7] ALJD, 6:29-35; Tr., 1757:8-1758:13 (Martorana); GC Ex. 2.

2. Legal Analysis.

a. There is No Evidence of Animus or Retaliatory Intent.

The ALJ properly found no evidence of animus or retaliatory intent. It was ***undisputed*** that Martorana evidenced no animus toward Jose Maldonado's request to work Saturday. Both Jose and David Maldonado admitted Martorana did not seem upset or angry by the request, and Martorana testified he did not care which day the Shop employees worked. In fact, the evidence shows that he left the choice up to the employees.

The General Counsel proffered two alleged statements as evidence of animus or retaliatory intent – an uncorroborated hearsay statement of a former supervisor and a statement by a non-supervisory employee that was immediately repudiated by Martorana. The ALJ properly found neither allegation provided credible proof of animus or retaliatory intent.

[7] Notably, although provided the opportunity, Jose Maldonado did not write any objection or comments in the space provided on the disciplinary form. GC Ex. 2.

i. Jose Maldonado's Testimony About A Supervisor's Alleged Hearsay Statement Was Not Credible.

The General Counsel's "primary support" for animus or retaliatory intent, Jose Maldonado's uncorroborated testimony about a statement former supervisor Eric Zufall allegedly made, was not credible.[8] ALJD, 7:1-17. During the hearing, Jose Maldonado testified he told Zufall he believed Martorana issued the verbal warning in retaliation for requesting to work Saturday, and Zufall allegedly responded, "Yeah, that's what you get for speaking up for the guys and them letting you down." [9] ALJD, 7:1-17.; Tr., 74:15-21 (J. Maldonado). This hearsay statement was wholly uncorroborated, and the only evidence of such a statement was Jose Maldonado's self-serving testimony. *See, e.g., Carpenters Dist. Council of Sabine Area, Local 753*, 248 NLRB 802, 806 (1980)("Mere uncorroborated hearsay or rumor does not constitute substantial evidence," citing *Consolidated Edison Co. of New York, Inc. v. N.L.R.B.*, 305 U.S. 197, 230 (1938)). Notably, the parties' stipulation expressly relegates these alleged statements to the uncorroborated hearsay status which cannot be relied upon. Tr., 1404:16-1405:6.

[8] The General Counsel did not allege Eric Zufall was a supervisor until the hearing, and the General Counsel never notified Athens that its purported evidence of animus was a statement from Zufall. By the time of the hearing, Eric Zufall had not been employed by Athens for over a year and could not be called to testify to refute Jose Maldonado's testimony. As a result, the parties reached a stipulation which acknowledged Zufall was a supervisor but explicitly agreed no party would argue for an adverse inference from the fact that Zufall was not called as a witness. Tr., 1404:16-1405:6.

[9] Notably, Jose Maldonado could not keep his story straight with respect to Zufall's alleged statement. When asked about his conversation with Zufall a short while later, Jose Maldonado testified as follows: "Q…Who said what in this conversation with Eric? A. I was walking and I'd seen Eric and I tell him that I don't think I deserve this write up. Q. Did Eric respond to you?...THE WITNESS: Yes. Q…How? A. By him telling me that don't worry about it. That he's not going to sign it. Q. Did he say anything else to you? A. No, that was it. Q. Do you recall whether you said anything else to him? A. No. we just both walked away." Tr., 76:10-23. It was only after the General Counsel prompted Jose Maldonado with a leading question on direct examination that he changed this testimony to include Zufall's alleged statement: "Q. Do you remember whether you said anything about why you got this write up? A. Oh, yes. Q. What did you say? A. I told him that I believe I got this write up for speaking up for the guys at the shop…Q. How did he respond? A. By him telling me yes, for -- that's what I get for speaking up for the guys and then letting me down." Tr., 76:24-77:11 (J. Maldonado).

Moreover, Judge Wedekind found Jose Maldonado "was not a particularly reliable witness" based on his demeanor, his admissions on cross examination, the lack of corroboration of his testimony, and the striking inconsistencies between his testimony and the substantial credible record evidence. ALJD, 3, fn. 9,[10] 7:1-17. As an ***example***, Judge Wedekind noted that Jose Maldonado testified, contrary to David Maldonado and Martorana, that Martorana told the employees they would work Sunday and never gave them the option to work Saturday. ALJD, 7:12-17; Tr., 128:23-129:16 (J. Maldonado). The ALJ noted this was a "significant inconsistency" because the fact that Martorana gave the employees the option to work Saturday would obviously undermine the inference that Martorana harbored animosity toward Jose Maldonado's request to work Saturday. *Id.*

The General Counsel urges the Board to overturn Judge Wedekind's decision, arguing the ALJ failed to consider other innocent explanations for the "significant inconsistency" in Jose Maldonado's testimony. However, as the Board has stated in countless cases, "[t]he Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951); *see also E. Coal Corp.*, 79 NLRB 1165, 1166 (1948)("[b]ecause a Trial Examiner has the opportunity of observing

[10] The ALJ expressed the care and diligence he made in reaching his credibility findings, noting, "In making credibility findings, all relevant and appropriate factors have been considered, **including the demeanor** and interests of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997). Careful consideration has also been given to the way the testimony was adduced by counsel. For example, in general, less weight has been afforded testimony of nonadverse witnesses about disputed matters that was adduced by counsel on direct examination through leading questions, particularly where there was no demonstrated or apparent need to refresh the witnesses' memory or rephrase their prior testimony to develop a full and clear record. See FRE 611(c); and *ODS Chauffeured Transportation*, 367 NLRB No. 87, slip op. at 1 (2019)." ALJD, at 3 n.9 (emphasis added)

the demeanor of witnesses who are testifying, it is the established policy of the Board to attach great weight to his credibility findings and it will not overrule them unless they clearly appear to be unreasonable.") (citations omitted); *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 420 (2004)("[T]here are many cases where a judge bases his or her [finding] of fact on a demeanor-based credibility resolution, and the Board affirms under *Standard Dry Wall*."). Although the General Counsel myopically focuses on the one example specifically called out by Judge Wedekind, as noted above, Judge Wedekind's credibility finding was based on much more than this one glaring inconsistency; it was based on many factors, including demeanor. ALJD, 3, fn. 9. The Board rarely, if ever, disturbs such credibility findings, and it should not do so here.

In fact, the record is replete with other examples similar to the one called out by Judge Wedekind where Jose Maldonado obviously fabricated false testimony to support the General Counsel's theory. For example, on both direct and cross examination, Jose Maldonado testified resolutely and unequivocally that he and David Maldonado had a rotating Saturday schedule and only worked the same Saturday if it followed a holiday. Tr., 59:13-16, 61:14-22, 64:19-65:2, 114:21-115:4, 116:10-16 (J. Maldonado) However, ***after*** being confronted on cross examination with time records showing that Jose and David Maldonado frequently worked the same Saturday – even though that Saturday did not follow a holiday – Jose Maldonado reluctantly admitted that, in fact, the default rule was that both Jose and David Maldonado were both expected to work every Saturday, and whether they could alternate Saturdays depended on workload and if they arranged for coverage amongst themselves. Tr., 120:1-8, 124:6-25 (J. Maldonado); Er. Ex. 1.

As yet another example, in his sworn affidavit, Jose Maldonado listed his direct supervisor as Martorana and no one else. Tr., 107:1-14 (J. Maldonado). At the hearing, though, he claimed two other individuals, Richard Gonzalez and Eric Zufall, were also his direct supervisors. Tr.,

106:19-25 (J. Maldonado). This inconsistency is striking because the supervisory status of Richard Gonzalez and Eric Zufall was essential to the General Counsel's case on the 8(a)(1) allegation related to Jose Maldonado's discipline and the 8(a)(1) surveillance allegation related to Richard Gonzalez (discussed below in Section II(C)(2)(b)).[11] Maldonado never explained why he omitted these highly relevant details from his affidavit.

Further impugning Jose Maldonado's credibility was the timing of this allegation. As cross examination exposed, after this disciplined was issued and during the parties' collective bargaining negotiations, the Union raised several instances of what it perceived to be improper or retaliatory Company conduct. Tr., 148:16-151:19 (J. Maldonado). After listening to the Union's grievances, Athens specifically asked the Union and its members if there was anything else it should be aware of, but neither the Union nor Jose Maldonado raised the discipline he had received less than two weeks prior. This is a particularly striking omission given that Jose Maldonado now claims a supervisor allegedly told him that he received the discipline because he engaged in protected activity just weeks before this meeting yet he said nothing about it when invited. Rather, the first time Maldonado raised this claim was immediately after the decertification petitions had been filed, when the Union was searching for claims that could block the petitions. Notably, when asked why he failed to raise this allegation in bargaining, Jose Maldonado could not explain this suspicious delay and merely responded, "Don't know." Tr., 150:24-151:3 (J. Maldonado); *see Spector Freight System*, 141 NLRB 1110 (1963)(discrediting the charging party's explanation for

[11] The General Counsel ambushed Respondent with the allegation of Zufall's supervisory status, resulting in the aforementioned stipulation that no adverse inference could be drawn from the fact Zufall did not testify as a witness. Tr., 1404:16-1405:6. Potentially more notable, the General Counsel was forced to abandon and withdraw its allegations that Gonzalez was also a statutory supervisor. Tr., 1403:8-13("And on a similar line, I just want to clarify for the record that it's the General Counsel's position that with respect to the complaint paragraph 5 [which alleged Richard Gonzalez is a 2(11) supervisor], that the General Counsel is only alleging that Richard Gonzalez, the procurement [*sic*] yard foreman, is a 2(13) agent, within the meaning of the Act…")

his actions, in part, because he did not give this explanation for his actions when he was previously criticized for this behavior).

As the foregoing examples highlight, Jose Maldonado's credibility was destroyed on cross examination, and the General Counsel's attempt to *ex post facto* rehabilitate Jose Maldonado's credibility by advocating on appeal for "innocent explanations" for one of the many inconsistencies in his testimony does not satisfy the Board's high burden for overturning demeanor-based credibility determinations. [12]

There is also no reason to presume that Judge Wedekind did not consider "innocent explanations" for Jose Maldonado's inconsistent testimony. In fact, the very opposite is true because the decision expressly states Judge Wedekind considered "all relevant factors" in rendering his credibility determinations. *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418 (2004)(There is no requirement that ALJs provide "a subexplanation of the demeanor-based credibility resolution."). The mere fact that Judge Wedekind did not meticulously detail every factor weighed in his credibility assessment does not support a presumption he failed to consider certain alternatives. In fact, had he done so, his already 51-page decision would have been much, much longer.

[12] The General Counsel also conveniently ignores the substantial circumstantial evidence making it improbable that Jose Maldonado would have simply forgotten that Martorana gave employees the option to work Saturday. Specifically, Martorana first presented the option at a safety meeting in April to give the employees time to think about and discuss the option and again at a safety meeting in May when the employees voted on which day to work. Jose Maldonado was at both meetings. ALJD, 5:44-6:7; Tr., 326:2-327:20 (D. Maldonado), 1744:3-1749:8 (Martorana); Er. Ex. 20; Er. Ex. 21. Then, immediately after the employees voted, he claims former supervisor Zufall attempted to override the election results by telling employees they would have to work Sunday instead of Saturday, which prompted Jose Maldonado to approach Martorana on behalf of the other employees. ALJD, 6:6-18; Tr., 67:10-69:1 (J. Maldonado), 334:1-13, 335:16-336:14 (D. Maldonado), 1751:3-6 (Martorana). Under these circumstances, it is highly implausible that Jose Maldonado made an innocent mistake when he testified Martorana imposed a Sunday schedule on employees.

ii. The Alleged Statement Made by Gonzalez Was Not Evidence of Animus.

As evidence of animus, the General Counsel also proffered an alleged statement made by Richard Gonzalez, a non-supervisory employee, who was in Martorana's office when Jose Maldonado made the request to work Saturday. Specifically, according to Jose Maldonado's discredited testimony, Gonzalez told the employees he would fire all of them after Jose Maldonado made his request. Tr., 69:70-70:6 (J. Maldonado). The General Counsel alleges this statement should be imputed on Athens as evidence of animus. However, Gonzalez is not a statutory supervisor,[13] and he was not involved in the decision to discipline Maldonado. ALJD, 7:21-24. Moreover, immediately after Gonzalez made this statement, Martorana repudiated the statement and reprimanded Gonzalez. ALJD, 6:13-18; Tr., 265:13-23 (D. Maldonado). An isolated, off-hand remark made by a non-supervisory employee who was not involved in the disciplinary decision and that was immediately rebuked by the manager cannot establish a retaliatory motive for discipline, particularly when the source of that alleged statement is a discredited witness. *See*, *e.g.*, *Central Plumbing Specialties*, 337 NLRB 973, 975-976 (2002)(finding that a statement made by a non-supervisory employee not involved in the disciplinary decision is not attributable to the employer for purposes of showing union animus was a motivating factor in the decision to discipline).

iii. The Circumstances Do Not Support an Inference of Animus or Discriminatory Intent.

Not only was there no credible direct evidence of animus or retaliatory intent, but the circumstances likewise do not support an inference of animus or discriminatory intent. The record

[13] As noted above, the General Counsel does not allege Gonzalez is a 2(11) statutory supervisor. Tr., 1403:8-13

evidence proved, and the ALJ found, that Martorana expected Jose Maldonado to be at work on May 19, 2018, and when Jose Maldonado failed to show or call in, Martorana disciplined him in accordance with Athens' attendance policies. ALJD, 6:20-27, 8:4-15. Moreover, the three other employees who failed to show up to work or call in prior to their shift were disciplined in the exact same manner. *Id.*

The General Counsel contrarily argues that a past practice of rotating Saturday schedules had been established and, pursuant to this rotation, Martorana would have known Jose Maldonado was not scheduled to work on Saturday. However, the formal written schedule[14] shows Jose and David Maldonado are both scheduled every Saturday, and time records show numerous examples of Jose and David Maldonado working the same Saturday. Tr., 120:1-8, 124:6-125:25 (J. Maldonado); Er. Ex. 1; Er. Ex. 19. Additionally, both Jose Maldonado and David Maldonado admitted at the hearing that the default rule was they both work Saturday and it was *their* responsibility to ensure Saturday coverage if one of them wanted to take a Saturday off without calling in. Tr., 115:13-116:9, 120:1-8, 124:6-125:25, 243:3-10 (J. Maldonado), 318:5-16, 319:15-18, 320:2-14, 322:22-323:5 (D. Maldonado). Accordingly, as the ALJ appropriately found, absent Jose or David Maldonado calling in or notifying their supervisors in advance who would be working, which neither did prior to May 19, Martorana "would not necessarily have known or assumed that only one of them was supposed to work after the barbeque on May 19." ALJD, 7:33-8:2.

Notably, the issue is not whether Jose Maldonado was actually scheduled to work on May 19, but whether Martorana relied on a good faith belief Jose Maldonado was scheduled to work

[14] The General Counsel erroneously asserts there is no formal written schedule. However, a formal written schedule was admitted into the record. Er. Ex. 19.

that day when he disciplined Maldonado. *See, e.g.*, *White Electrical Construction Co.*, 345 NLRB 1095, 1096 (2005) (employer does not violate the Act when it disciplines employees based on a good faith but mistaken belief that the employees engaged in misconduct); *Neptco, Inc.*, 346 NLRB 18, 19 (2005)("Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws."); *McKesson Drug Co.*, 337 NLRB 935, 936, fn. 7 (2002)(an employer "must show that it had a reasonable belief that the employee[s] committed the offense, and that it acted on that belief when it discharged [them]."). The evidence shows that Martorana reasonably and in good faith expected Jose Maldonado to work on May 19,[15] absent a call in or otherwise arranging for adequate Saturday coverage. When he failed to do either, Martorana disciplined him in the exact same manner as the other employees who failed to show up to work or call in prior to their shift.

Moreover, neither before nor after the discipline did anyone present any evidence to Martorana that he was mistaken in his belief that Jose Maldonado was supposed to work that day. ALJD, 6:26-35, 8:4-15; Tr., 1757:8-1758:13 (Martorana). Although Jose Maldonado protested that it was his day off when Martorana issued the discipline, Martorana showed Jose Maldonado time records that revealed Jose Maldonado had taken the last three consecutive Saturdays off. *Id.* Upon viewing these time records, Jose Maldonado said he must have been mistaken and signed the discipline without protest or comment.[16] *Id.* Such circumstances certainly do not permit an inference of pretext for animus or retaliation.

[15] As noted, Martorana had expressed to the Shop employees that it would be "all hands on deck" that day. Tr., 1749:16-1750:11 (Martorana).

[16] At the hearing, Jose Maldonado testified that he missed three Saturdays in a row because, on the Saturday he was supposed to work, he called in sick. However, even assuming this is true, there is no evidence this was ever conveyed to Martorana or any other supervisor any time before or after Martorana issued the discipline. ALJD, 8:8-15; 1757:8-1758:13 (Martorana).

Finally, any potential inference was effectively militated and rebuffed by the facts that Martorana not only had reacted positively in response to Jose Maldonado's request for confirmation that the Shop employees would work Saturday, not Sunday, but, in fact, actually later provided Jose Maldonado a significant promotion, together with an *over $7 per hour increase in pay*. Tr., 152:1-154:24 (J. Maldonado); 1760:18-1762:2 (Martorana). As such, the ALJ properly rejected the General Counsel's allegation of animus and there is no justification to disturb that result.

b. <u>Athens Did Not Provide Shifting Reasons for Jose Maldonado's Discipline.</u>

The General Counsel also argues that Martorana provided shifting explanations for the reason for Jose Maldonado's discipline because Martorana also stated the discipline was for Maldonado missing three Saturdays in a row. This is not true. The disciplinary form states Jose Maldonado is being disciplined for a no-call/no-show, and when Martorana met with Jose Maldonado, he explained the discipline was for failing to call in for a shift. ALJD, 6:26-35, 8:8-15; Tr., 1759:20-1760:2 (Martorana); GC Ex. 2. It was only after Jose Maldonado claimed it was his Saturday off that Martorana showed him the time records showing three consecutive missed Saturdays. *Id.*; Tr., 1757:8-1758:13 (Martorana). Jose Maldonado never contested the accuracy of the time records. *Id.*

Importantly, this dialogue was merely a response to Jose Maldonado's statement. It was not a basis for discipline. ALJD, 6:26-35, 8:8-15; Tr., 1757:8-1758:13, 1759:20-1760:2 (Martorana); GC Ex. 2. Rather, the only basis for discipline was always Jose Maldonado's failure to call in or report to work on a day his manager, Martorana, expected him to show up to work. ALJD, 6:26-35, 8:8-15; Tr., 1759:20-1760:2 (Martorana); GC Ex. 2.

c. Athens Met Its Wright Line Burden of Proving it Would have Disciplined Jose Maldonado in the Absence of Protected Activity.

Even if the General Counsel had met her *prima facie* burden, the record evidence shows Athens would have disciplined Jose Maldonado even in the absence of protected activity. The record evidence shows: (1) Martorana expected Jose Maldonado to be at work on Saturday May 19, 2018, (2) Jose Maldonado did not call in prior to his shift, which warrants discipline under Athens attendance policy, and (3) Martorana issued the same level of discipline to all other employees who failed to call in prior to their shift on May 19, 2018. This evidence shows Athens would have disciplined Jose Maldonado even in the absence of protected activity.

B. Athens Did Not Create an Impression of Surveillance in Violation of Section 8(a)(1) on July 12, 2018.

The ALJ properly dismissed the allegation that Martorana created an impression of surveillance on July 12, 2018. Accordingly, the General Counsel's Exception 2, including Exceptions 2(a)-2(b), have no merit.

1. Relevant Facts.

The Union regularly sets up a tent on the sidewalk outside the Pacoima Yard's main gate to meet with employees on their breaks or before or after their shift, and employees regularly meet with the Union at its tent at these times without interference or consequence. Tr., 155:8-20, 157:9-158:15 (J. Maldonado), 1762:3-25 (Martorana). The only rule for participation is that such activities need to be conducted during nonworking time. Tr., 156:17-22, 159:21-25 (J. Maldonado), 1763:11-15 (Martorana).

At the hearing, Jose Maldonado claimed that, on July 12, shortly before his meal break, Martorana walked by and allegedly commented, "[I]f [you] give the Union 30 minutes, then [you]

got to give the company their 30 minutes." ALJD, 9:7-16; Tr., 82:23-83:12 (J. Maladondo). Jose Maldonado claims he responded that was fine, and the conversation ended. *Id.*

The General Counsel claims Martorana's alleged statement created an unlawful impression of surveillance, but the record evidence, as ALJ Wedekind properly found, proves otherwise.

2. Legal Analysis.

a. Jose Maldonado's Testimony Regarding Martorana's Alleged Statement Was Not Credible.

As detailed above, cross-examination exposed Jose Maldonado as a palpably dishonest witness who fabricated false testimony to support the Union's charges and the General Counsel's theories. In addition to the examples discussed above, Jose Maldonado gave false, transparently tailored testimony related to this allegation as well. Specifically, Jose Maldonado testified three times without equivocation that he talked to the Union at its tent the same day as, but before, Martorana made the alleged statement. Tr., 83:3-6, 160:4-17, 172:21-25 (J. Maldonado). Of course, this testimony tended to support the General Counsel's theory because it implied Martorana saw Jose Maldonado talking to the Union before making this alleged comment about how long Maldonado talked to the Union. However, on cross examination, Jose Maldonado was confronted with his sworn affidavit in which he stated that he did not speak to the Union that day until lunch, which was after Martorana allegedly made this comment. Tr., 172:21-174:6 (J. Maldonado). Faced with this sworn statement, Jose Maldonado finally admitted that he did not actually recall speaking to the Union earlier that day. *Id.*

The falsehoods and striking inconsistencies in Jose Maldonado's testimony show his testimony is not credible, and ALJ Wedekind, reviewed together with his demeanor, properly discounted it.

b. Martorana's Alleged Statement Did Not Create An Impression of Surveillance.

Even if it had been said, based on the circumstances in which Martorana's alleged statement was made, employees would not reasonably believe Martorana had placed Jose Maldonado's union activities under surveillance. "In determining whether an employer has unlawfully created the impression of surveillance, the Board asks whether employees would reasonably assume from the statement in question that their union activities have been placed under surveillance." *National Hot Rod Association*, 368 NLRB No. 26, 2-3 (2019)(internal quotations and citations omitted). In applying this test, relevant considerations include whether the employer's statement reflects detailed knowledge of specific activities and whether the employee's union activities had been conducted in the open so that management could have learned about the activities through other means. *Id.* (finding lawful a statement indicating general awareness of organizing activities where employees had not conducted their organizing activities in secret and the statement did not reveal specific detailed knowledge of employees' organizing activities); *see also Waste Management of Arizona*, 345 NLRB 1339, 1339-1340 (2005)(manager did not create impression of surveillance where he stated that "he knew that employees had held a union meeting" but did not indicate that he had detailed information about the meeting, and there were "various other ways in which [the manager] might have learned of the nonsecret meeting"); *Flamingo Las Vegas Operating Co.*, 359 NLRB 873 (finding supervisor's remarks about a security guard did not unlawfully create an impression of surveillance where security guard openly identified as union organizer, thus, employees could not reasonably conclude that the supervisor had learned of the security guard's union activities through surveillance); *Aladdin Gaming, LLC*, 345 NLRB 585,

586 (2005)(an employer's routine observation of union activities openly conducted in public cannot create an unlawful impression of surveillance).

The record evidence proved that Jose Maldonado "was an open and active union supporter and member of the union bargaining committee" who frequently spoke to the Union at its tent on the public sidewalk outside the main gate of the Pacoima Yard during his meal breaks. ALJD, 9:6-7; Tr., 107:24-108:25, 157:9-158:8, 163:13-20, 166:2-11 (J. Maldonado). There was no evidence Jose Maldonado conducted his union activities in secret. Nor did Martorana's alleged statement indicate detailed knowledge of Jose Maldonado's union activities, such as what he talked about with the Union, which Union representatives he talked to, or the precise dates and times when he talked to the Union. To the contrary, Martorana's alleged remark was phrased as a conditional statement, beginning with "if." This speculative statement by its very nature cannot convey detailed knowledge of past activities, much less convey that activities were actually being tracked.

Indeed, even under the General Counsel's theory, Martorana's statement, at most, indicated Martorana knew Jose Maldonado talked to the Union during his meal break at the Union tent on the public sidewalk just outside the Pacoima Yard's main gate. However, it was no secret that Jose Maldonado did this, and anyone inside the Pacoima Yard could see him regularly doing this on his meal breaks. Tr., 157:9-158:8, 163:13-20, 166:2-11 (J. Maldonado). Thus, far from it being reasonable to assume Martorana gained knowledge of Jose Maldonado's mealtime visits through surveillance, it would actually be *unreasonable* to assume as much given the open and highly visible nature of such visits.

The timing of the alleged remark also belies any reasonable impression of surveillance. As noted above, Jose Maldonado admitted he did not talk to the Union earlier that day and there is no

evidence Martorana's statement followed closely on the heels of some covert union activities.[17] Tr., 172:21-174:6 (J. Maldonado). Rather, Martorana allegedly made this statement right before Jose Maldonado's meal break, and Maldonado himself admitted on cross examination that he believed Martorana was merely reminding him to speak to the Union during non-working time. ALJD, 9:6-16. Tr., 162:19-23 ("I guess I was -- just understood that if -- once my 30 minutes are up, then I've got to get back to work and I can't talk to the Union.") While the impression of surveillance test is an objective one, the interpretation ascribed to the statement by the employee who heard it is certainly powerful evidence of what a reasonable employee would understand the statement to mean, particularly when that interpretation contradicts the General Counsel's theory of a violation.

Additionally, the General Counsel's proffered interpretation "would make no reasonable sense under the circumstances." ALJD, 9:27-28. The General Counsel contends Martorana's alleged remark "conveyed that Respondent had observed Maldonado engaging in union activity and that Jose needs to devote equal time between union activities and work." General Counsel's Brief In Support of Exceptions, p. 17. However, Judge Wedekind aptly noted:

> As Maldonado himself testified, the timing of Martorana's statement indicated that it referred to his 30-minute meal break. By definition, break time is not work time. Further, Maldonado and the other shop employees were not even on the clock during their meal break; they were required to clock out before and clock back in after. Thus, they were clearly not taking time away from the Company by talking to the Union during their meal break.

ALJD, 9:27-32.

[17] The General Counsel argues in its brief, "With respect to July 12, before Jose clocked in to work, he spoke with Union representatives outside of work." This statement is false and misleading. As noted above, Jose Maldonado disavowed this testimony on cross examination after being confronted with his sworn affidavit. Tr., 172:21-174:6 (J. Maldonado).

In sum, not only is Jose Maldonado's testimony about this alleged statement not credible, but even assuming the statement was made, it could not create an unlawful impression of surveillance because it did not convey detailed knowledge of secret union activities. Thus, the ALJ properly dismissed this allegation, and the General Counsel's Exception 2, including Exceptions 2(a)-2(b), should be denied.

C. Athens Did Not Unlawfully Surveil Employees During the Union's August 2, 2018 Trespass.

The evidence also shows Athens did not unlawfully surveil protected activity when the Union's representatives trespassed onto Athens property on August 2, 2018. Accordingly, the General Counsel's Exception 5, including Exceptions 5(a)-5(k), and Exception 8 are without merit.

1. Relevant Facts.

The Labor Peace Agreement ("LPA") between Athens and the Union affords the Union limited access rights to its Pacoima Yard. [18] The LPA provides, in relevant part:

> [U]p to three representatives of ***the Union may access the non-working areas*** of the Facilities for up to thirty-two hours each calendar month. The Union may engage in organizing efforts in non-working areas of the Facilities during Employees' non-working times (before work, after work, and during meals and breaks) and/or during such other periods as the parties may mutually agree…The Union representatives shall provide at least twenty-four (24) hours advance notice of their visit and ***must receive prior approval*** from the Employer, which shall not be unreasonably denied. ***Following approval, the Union shall check in upon arrival and shall follow all Employer safety and security protocols while on property.***

Jt. Ex. 2 at ¶ 7; *see also* ALJD, 17:4-6, 17:15-16.

[18] As noted above, the City of Los Angeles passed an ordinance that required Athens to enter into a "labor peace agreement" with the Union in order to keep a substantial portion of its existing business in the City of Los Angeles. *See* ALJD, pp. 1-2; Athens Post-Hearing Brief, pp. 3-5, Section II(B).

On July 30, 2018, the Union notified Athens it planned to access the Pacoima yard at 1 p.m. on August 2, 2018. ALJD, 14:13-15, 17:4-6. Pursuant to the LPA, Athens approved the access.

Twice during the afternoon of August 2, 2018, the Union attempted to bring a competitor employee from Republic Services, dressed in the competitor's uniform, onto the yard during its approved access. ALJD, 14:15-19, 17:15-20. Both times, HR Manager Lupe Guerrero-Ramirez informed the Union it could not bring the Republic Services employee onto Athens property. *Id.* Immediately after the second incident, the Company's attorney emailed the Union's attorney, requesting that "the Union immediately cease bringing unauthorized competitor employees on the property and take all actions to ensure that union representatives cooperate with requests from management." ALJD, 4:21-28. The Union's attorney assured Athens this would not happen again. *Id.*

At approximately 6:15 PM on August 2, 2018, the last truck returned from its route and Martorana directed Security Guard Furquan to close the Pacoima Yard gates. Er. Ex. 22; Tr., 1774:20-23 (Martorana). *By this time, the Union had already completed its approved access earlier that day, had exited the yard, and its representatives were standing outside the yard at the Union tent on the public sidewalk.* Tr., 768:8-12, 770:18-25 (Acosta), 1787:24-1788:1 (Martorana). When Furquan closed the main gate, which is immediately adjacent to the Union tent, the Union representatives protested, and Furquan responded the yard was closed for the day.

Before Furquan could close the side gate, though, two Union representatives *and the competitor employee from Republic Services, dressed in a Republic Services uniform*, snuck onto the yard through the side gate. ALJD, 14:30-15:7; Tr., 1775:13-18 (Martorana). Furquan reported the incident to Martorana who asked where the Union representatives were. ALJD, 15:9-14; Tr.,

1775:23-25, 1816:4-11, 1833:19-1834:6 (Martorana). Furquan responded they had disappeared among the rows of large trucks in the yard. *Id.*

A few minutes later, the Union representatives and the competitor Republic Services employee were observed and approached by Martorana in the yard. ALJD, 15:16-22; Tr., 1775:25-1776:25 (Martorana); 785:8-9 (Hernandez); Er. Ex. 23. Martorana informed the Union the yard was closed and they needed to leave, but the Union ignored Martorana and proceeded toward the Pacoima building. Martorana followed them, again warning the Union representatives they were trespassing and he would call the police if they entered the building. *Id.* Undeterred, the Union representatives and the competitor employee continued to walk into the building and stated "call them now then." *Id.*

The Union representatives and the competitor Republic Services employee then entered the building, walked passed the common area break room and headed toward the adjacent Training Room, a working area. ALJD 15:24-31; Tr., 1777:17-1778:7, 1780:3-15, 1792:18-22 (Martorana); Er. Ex. 23. As they did, Martorana objected, stating they were only allowed in the common area, not the Training Room. ALJD 15:24-31; Tr., 1822:5-10 (Martorana); Er. Ex. 23. The Union representatives ignored Martorana's directives and proceeded to enter the working area.

By this point, Martorana had called his General Manager to seek guidance on how to respond, and he can be heard on the video asking, "Tomas, what do you want me to do?" ALJD, 16:1-6; Er. Ex. 23. As Martorana exited the Training Room, one of the Union representatives said, "Be ready" and "Go fuck yourself." *Id.*

After Martorana left, Security Guard Furquan entered the Training Room and recorded the unauthorized activities of the trespassing Union representatives and competitor employee. ALJD, 16:14-16. Notably, as the Union representatives and Athens employees admitted at the hearing,

Furquan was holding his phone toward the Union representatives, not the Athens employees. Tr., 752:9-11 (Acosta), 356:24-357:2 (D. Maldonado); 798:6-8 (Hernandez). Furquan then exited the Training Room. ALJD, 16:14-16; Tr., 91:22-23 (J. Maldonado).

Richard Gonzalez, a non-supervisory employee, subsequently entered into the Training Room to eat his lunch. ALJD, 16:16-20; Tr., 92:1-2 (J. Maldonado). He sat away from the other employees, and did not speak to anyone. ALJD, 16:16-20; Tr., 92:9-10, 194:1-8, 195:4-6 (J. Maldonado). In fact, an Athens' employee told the Union representatives "that it's okay for him to stay there, because anyway, he doesn't speak Spanish and we can talk in Spanish." Tr., 754:20-22 (Acosta). Gonzalez stayed in the Training Room after the Union representatives and other employees left, continuing to eat his lunch. ALJD, 16:16-20; Tr., 789:21-22 (Hernandez).

2. Legal Analysis.

a. Athens Was Privileged to Record the Union's Unauthorized Activities Because It Had a Reasonable Concern of Trespassing.

The ALJ correctly found Athens did not violate the Act when it recorded the Union's unauthorized activities on August 2, 2018 because it had a reasonable concern of trespassing. It is not unlawful for an employer to record union activities where it has a reasonable concern of trespassing. *See, e.g.*, *Smithfield Foods, Inc.*, 347 NLRB 1225, 1228 (2006); *UFCW Local 204 v. NLRB*, 506 F. 3d 1078, 1086-1087 (D.C. Cir. 2007). The ALJ's finding that Athens had such a reasonable concern is well-supported by the record evidence.

First, while the LPA affords the Union limited access rights upon advance notice and preapproval, Athens never approved the Union's access to the Pacoima Yard on the night of August 2, *after the yard had closed*. The General Counsel argues the Union's access was privileged under the LPA because the Union notified the Company on July 30, 2018 that it would

access the Pacoima Yard at 1 p.m. on August 2.[19] However, that notice clearly states access will be at 1 p.m., not more than five hours later, at approximately 6:30 p.m. when this incident occurred, and Athens only approved access for 1 p.m. Pursuant to this approval, the Union ***took and completed*** its 1 p.m. access and left the yard. Athens certainly did not approve additional access nearly six hours later, after the Pacoima Yard had closed for the day and after the Union had already left the yard for the day.

Second, the LPA requires the Union to "follow all Employer safety and security protocols while on [the] property." Athens repeatedly told the Union representatives the yard was closed, they were trespassing, they needed to immediately leave the yard, and they cannot enter the Training Room, but the Union refused to comply with these directives. Thus, even assuming Athens had approved access that night, which it did not, once the Union refused to comply with management's instructions to leave the closed yard and stay out of working areas, the Union lost any alleged privilege under the LPA.

Finally, Athens admonished the Union that it could not bring a competitor employee from Republic Services onto its property at least three times that day, and after receiving an email from Athens' attorney about the issue, the Union agreed to refrain from doing this again. Yet, shortly after providing these assurances, the Union brought the competitor employee onto Athens yard and refused to leave despite repeated requests from management. Once the Union broke this agreement and brought the competitor onto Athens' property, after expressly agreeing not to, the Union was trespassing.

[19] As noted in the ALJ's decision, the General Counsel did not argue that the Union was privileged to access the Pacoima Yard under the Act. ALJD, 16:35-37.

The General Counsel contends bringing a competitor employee onto Athens property does not violate the access terms of the LPA because the LPA does not specify who can act as a Union representative during approved access. However, the parties' communications about the competitor employee – including the Union's agreement to not bring competitor employees onto the property – show the parties understood this was not permissible under the LPA. Indeed, given the potential security risks associated with a competitor's employee accessing Athens' property, it is quite a stretch to suggest the LPA reasonably permits such occurrences, particularly when Athens immediately objected to each occurrence. In any event, once the Union agreed not to bring competitor employees onto the property, which it did *before* the trespassing incident, its failure to abide by that commitment gave Athens reasonable grounds to believe the Union was trespassing.

b. Gonzalez Did Not Unlawfully Surveil Employees' Protected Activities.

The ALJ's finding that Gonzalez did not unlawfully surveil employees or create an impression of surveillance on August 2 is well-supported by the record evidence. By the General Counsel's own theory, employees routinely ate lunch in the Training Room, and Gonzalez went into the Training Room to eat lunch on August 2. Although the General Counsel characterizes this as unusual, there is certainly nothing unusual about a non-supervisory employee eating lunch where all the other non-supervisory employees eat lunch. Moreover, the employees and Union agents were speaking in Spanish, and one of the employees said not to worry about Gonzalez' presence because he does not speak Spanish. Thus, the employees knew Gonzalez could not understand their discussions in Spanish, and therefore they could not reasonably believe he was surveilling their activities.

The General Counsel argues Gonzalez should be deemed a statutory agent of Athens, but she provides absolutely no reason, let alone citations to record evidence, why Gonzalez should be deemed Athens' agent during this incident. To establish agency, the General Counsel must show Gonzalez had actual or apparent authority to surveil employees' union activities. *See, e.g., Cornell Forge Company*, 339 NLRB 733, 733 (2003)("The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). An individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party."); *Custom Top Soil, Inc.*, 327 NLRB 121 (1998)(finding no violation where a bookkeeper told union members who were applying for work that their union membership would adversely affect their chances of working for the employer, since she had no regular role in the job application process and had no knowledge of or authority to speak or act on the employer's hiring policies).

There is no evidence that Martorana asked Gonzalez to watch the Union for him, and the General Counsel does not argue Gonzalez was a supervisor, nor does she explain why employees would reasonably believe Gonzalez was acting on behalf of management when he sat and eat his lunch in the Training Room that day. Without credible proof of actual or apparent authority to surveil employees' activities on behalf of management, Gonzalez' actions cannot be imputed onto Athens.

Nevertheless, even assuming *arguendo* Gonzalez was acting on behalf of management, the General Counsel's theory still fails. First, because Athens had a reasonable belief of trespassing, Athens was privileged to have Gonzalez observe the Union's unauthorized activities on its property. See discussion above in Section II(C)(2)(a). Second, by the General Counsel's own theory, the Training Room was an open area that any manager or employee could access at

will, and it is well established that an employer cannot unlawfully surveil protected activity occurring in the open. *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005)(an employer's routine observation of union activities openly conducted in public cannot create an unlawful impression of surveillance).

Accordingly, the General Counsel's Exception 5, including Exceptions 5(a)-5(k), and Exception 8 should be dismissed.

D. Athens Did Not Violate Section 8(a)(1) or 8(a)(3) By Closing the Training Room.

As the ALJ found, based on the record evidence, Athens closed[20] the Training Room in response to the Union's unauthorized, trespassory use of this working area in violation of the LPA and management's explicit directives. Accordingly, Athens did not violate Section 8(a)(1) or Section 8(a)(3), and the General Counsel's Exception 6, including Exceptions 6(a)-6(f), have no merit.

1. Relevant Facts.

As noted above, video evidence shows Martorana telling the trespassing Union representatives that they cannot enter the Training Room because it is not an appropriate non-working area under the LPA. ALJD 15:24-31; Tr., 1780:5-15 (Martorana); Er. Ex. 23. The Union representatives responded to Martorana's directive with expletives and blatant defiance, entering the Training Room and refusing to leave. *Id.* Shortly after the trespassing incident, Athens' attorney sent the Union a letter addressing the incident and reminding the Union that its representatives must adhere to the parameters of the LPA while on property, which includes

[20] As noted in its post-hearing brief, Athens maintains that it did not "close" the Training Room, rather, the room was a work area restricted from use. Nevertheless, for the purpose of this Opposition to the General Counsel's meritless exceptions, Athens accepts the ALJ's finding Athens' closed the Training Room.

following management's directives and remaining in non-working areas. ALJD, 19:25-28; Er. Ex. 9.

2. Legal Analysis.

The overwhelming weight of the evidence shows Athens did not close the Training Room in response to union activity; if anything, Athens' actions related to the Training Room were a clear reaction to the Union's trespass into a working area that the Union put to unauthorized use and in response to the Union's indication it would continue to use the working area in this unauthorized manner in the future. Judge Wedekind aptly summarized the supporting record evidence as follows:

> The record plainly indicates that the Company's objection was not to the employees meeting with union representatives during their meal breaks, but to them doing so in what the Company perceived to be a working area rather than a nonworking area as required by the LPA. Contrary to the General Counsel's brief, there is no record evidence that any supervisor or manager knew prior to August 2 that the union representatives were meeting with employees in the training room during their Thursday evening meal breaks or had authorized them to do so. On the contrary, Martorana's reaction [as shown on video] on August 2 when the union representatives approached the training room clearly indicated both (1) that he was not aware union representatives had been meeting with employees during their Thursday evening meal breaks; and (2) that he did not believe it was an appropriate nonwork area under the LPA for them to do so. See also Attorney Abrahms' subsequent August 7 letter to Attorney More (E. Exh. 9), which referenced the August 2 events and advised the Union that it must comply with all the LPA parameters, including that access must be limited to non-working areas unless the parties mutually agree otherwise.

ALJD, 19:15-28.

The General Counsel argues Athens' stated justification is pretextual because Athens could not reasonably perceive the Training Room as a working area. This contention is plainly belied by ample record evidence showing Athens used this room to conduct work activities such as

trainings and meetings, and Athens had no knowledge that employees used the Training Room to meet with the Union in the past, nor had it authorized or condoned such use. Tr., 66:2-22 (J. Maldonado), 1655:25-1657:2 (Martorana); Er. Ex. 2.

In any event, though, as the ALJ noted, Athens is not required to prove its belief that the Training Room was a working area was reasonable or arguably correct; it only needed to prove it relied on a good faith belief the Training Room was a working area when it closed the Training Room. ALJD, 19:25-28, fn. 42 ("The General Counsel has not alleged or argued that locking the Training Room and preventing the Shop employees from continuing to take their evening meal breaks and meet with union representatives there was inherently destructive of their statutory rights under *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). The Company therefore was not required to show that its position regarding the Training Room—that it was a working area under the LPA—was reasonable and arguably correct."); *see also National Fuel Gas Distribution Corp.*, 308 NLRB (1992)(finding no violation "in the absence of independent evidence of discriminatory motivation" where "Respondent's termination of the contract benefits involved here, based on a good-faith, albeit erroneous interpretation of law and regulations, was not of the breadth of character of conduct which the Board and courts have defined as 'inherently destructive.'").

The record evidence shows Athens had a good faith belief that the Training Room was a working area, and its actions related to the Training Room were because the Union used the Training Room without permission, refused to leave despite repeated requests to do so, and indicated by both words and actions that it would continue to use the Training Room in the future regardless of management's directives. These circumstances do not support an inference of animus.

Further belying any inference of animus, as the ALJ found, locking the Training Room was not a "grossly disproportionate response to the Union's perceived misconduct and violation of the LPA," particularly given that the Union made it clear it had no intention of following Athens' directives regarding the Training Room. ALJD, 19:20:3. The General Counsel tries to obfuscate the issue by ignoring the Union's misconduct and focusing on the proportionately to employee misconduct. However, the proportionality to any perceived employee misconduct is not the issue. The issue is whether locking the Training Room was such a grossly disproportionate response to the Union's unauthorized use of the Training Room that Athens' stated justification must be pretextual. The circumstances here certainly do not support such an inference, nor has the General Counsel argued that they do.

The General Counsel has completely failed to provide any credible or substantial evidence of animus. Even though Athens and the Union bargained for an initial collective bargaining agreement for a full year, the General Counsel's entire case for animus boils down to two isolated events and a low level discipline. The ALJ correctly found most of these allegations had no merit and the few that did were unintentional. However, irrespective of their merit, minor, discrete occurrences such as these do not support a finding of animus.

For the foregoing reasons, Athens did not violate Section 8(a)(1) or Section 8(a)(3) when it closed the Training Room, and the General Counsel's Exception 6, including Exceptions 6(a)-6(f), should be dismissed.

E. Athens Did Not Fail to Bargain in Good Faith Over the Decision to Close the Training Room.

Athens had no duty to bargain over the decision to close the Training Room in response to the Union's trespass and demonstrated refusal to comply with management's directives not to enter

the Training Room. Thus, the General Counsel's Exception 7, including Exceptions 7(a)-7(b), have no merit and should be dismissed.

As noted above, the record evidence proved Athens' actions related to the Training Room were because the Union trespassed onto its property after hours, refused to comply with management's directives to stay out of the Training Room, and indicated it would continue to engage in such conduct in the future. It is well established that an employer does not violate the Act when it implements a unilateral change in response to a union's unprotected conduct. *See, e.g., Phelps Dodge Copper Products Corp.*, 101 NLRB 360, 368 (1952) (finding no 8(a)(5) violation where the Union engaged in a "harassing tactic irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relationship upon which good faith bargaining must rest."); *Valley City Furniture Company*, 110 NLRB 1589, 1592 (in finding an employer has no duty to bargain where the union threatened the employer's representatives, the Board explained, "Were we to hold otherwise, we would be encouraging the use by unions of threats of unlawful and unprotected action to force concessions from an employer. Such a result would be contrary to the policy objectives of the Act."); *Times Publishing Co.*, 72 NLRB 676, 682–83 (1947)("The test of good faith in bargaining that the Act requires of an employer is not a rigid but a fluctuating one, and is dependent in part upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table. It follows that, although the Act imposes no affirmative duty to bargain upon labor organizations, a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found.").

As the ALJ found, extenuating circumstances existed here because a video showed the Union trespassing onto Athens property after hours and repeatedly refusing to comply with management and security directives to not enter the Training Room. ALJD, 19:32-20:3 ("As indicated above, the union representatives had repeatedly demonstrated by both their actions and words on August 2 that they were unlikely to stop meeting with the Shop employees there in the future simply because the company managers or supervisors said they were not allowed to. Thus, the Company could reasonably conclude that it was necessary to lock the Training Room to preserve and enforce its position.") The Union's refusal to stay out of the Training Room, despite management's repeated protests that the Training Room was an off-limit working area, privileged Athens to lock the Training Room without first providing notice and an opportunity to bargain over the decision.

To obfuscate the issue, the General Counsel ignores the Union's own misconduct that triggered Athens' action and instead focuses on what economic exigencies can justify a unilateral change. However, the precedent relied upon by the General Counsel is irrelevant because Athens did not close the Training Room due to economic exigencies. Athens' actions were in response to the Union's trespass and refusal to stay out of what Athens perceived, in good faith, to be a working area. As noted above, it is well-established that an employer has no duty to bargain where a union engages in harassing or unlawful conduct antithetical to good faith bargaining and that is precisely what the Union did here when it attempted to commandeer a working area for its own use.

As a result, Athens had no duty to bargain over the decision to close the Training Room, and the General Counsel's Exception 7, including Exceptions 7(a)-7(b), should be dismissed.

F. The Judge Did Not Err In Finding the Sustained 8(a)(1) Violations Were Unintentional.

Oddly, the General Counsel excepts to the 8(a)(1) allegations the ALJ sustained. However, it is clear why she does so – the Judge's findings affirmatively reject any inference of union animus or discriminatory intent with respect to the 8(a)(3) allegations. The General Counsel excepts to these proper findings in an illegitimate attempt to bootstrap arguments in support of its other meritless exceptions. Nonetheless, the General Counsel's Exception 3, including Exceptions 3(a)-3(l), and Exception 4, including Exception 4(a), have no merit because the record evidence shows, as the ALJ found, Athens' actions were not motivated by union animus or discriminatory intent.

1. Relevant Facts.

As noted above, on July 12, the Union set up a tent on the sidewalk just outside the main gate of the Pacoima Yard.[21] Around 6 p.m., former supervisor Eric Zufall informed Martorana that Union representatives and employees meeting with the Union were calling the security guard racial epithets and harassing him. ALJD, 10:11-15; Tr., 1764:11-1765:19 (Martorana); 1865:20-1867:5 (Solis). Martorana immediately contacted General Manager Tomas Solis, who had already left for the day, to seek guidance on what to do. ALJD, 10:17-25; Tr., 1765:20-1766:7, 1767:9-1768:10 (Martorana), 1865:20-1867:5 (Solis). Solis asked for the employees' names, but Martorana did not know them. Tr., 1768:11-18 (Martorana), 1867:10-1868:20 (Solis). As a result, Solis instructed Martorana to have the security guard take pictures of the employees in uniform so he could identify and speak to them the next day. ALJD, 10:17-25; 1867:10-1868:20, 1870:24-

[21] Notably, this was the week immediately following the employees' filing of the decertification petition and the Union was more aggressive than usual.

1871:9 (Solis). However, Martorana misunderstood Solis because of a poor phone connection and Solis' thick Spanish accent,[22] and he erroneously instructed the security guard to tell employees they had to be out of uniform when speaking to the Union and to take pictures of those who did not comply. ALJD, 10:17-25; Tr., 1768:19-1770:6 (Martorana).

When the security guard conveyed these instructions to the employees, the Union representatives immediately objected with vulgarities and obstinate defiance, telling the security guard the employees were well within their rights and the manager can "go fuck himself." ALJD, 11:1-8; GC Ex. 14(b), 14(d). When the employees did not comply with the erroneous instruction, the security guard allegedly took pictures of the employees in uniform. ALJD, 10:10-18; GC Ex. 14(b), 14(d). Separately, Martorana relayed the errant directive and was met with similar vulgarities. ALJD, 11:25-33; GC Ex. 14(e). In response, Martorana did not react with hostility or display any indication of animus. *Id.* To the contrary, he calmly expressed his desire to remain neutral, noting, "We don't really want to get in the middle as per the Peace Agreement."[23] *Id.*; Tr., 1831:14-22 (Martorana) This certainly belies any implication of animus.

The next day, Martorana explained what he had said to HR Manager Lupe Gurerrero-Ramirez. ALJD, 11:35-12:1; Tr., 1772:2-25 (Martorana), 1869:24-1870:10 (Solis), 1629:5-1631:18 (Ramirez). Ramirez immediately reproached Martorana because he told employees they cannot speak to the Union in their uniforms and directed Martorana to "fix it." *Id.* Martorana immediately did as Ramirez instructed. ALJD, 12:3-5; 1773:1-17 (Martorana).

[22] Notably the Judge and the General Counsel had an opportunity to hear Solis' heavy accent when Solis testified at the hearing, and the General Counsel does not contest the fact that Solis' thick Spanish accent makes it difficult to understand him.

[23] As detailed in Athens' post-hearing brief, the Labor Peace Agreement requires Athens to remain neutral on the Union. *See* Athens' post-hearing brief at Section II(B), pp. 3-5.

After speaking to Ramirez, Martorana talked to General Manager Tomas Solis. ALJD, 12:1-3; Tr., 1773:20-1774:2 (Martorana), 1865:5-23 (Solis). Solis reacted with surprise and told Martorana he had misunderstood the instruction. *Id.*

The ALJ ultimately sustained the two 8(a)(1) allegations that arose out of this incident, but he also expressly found these violations were not evidence of animus or discriminatory intent. Rather, the ALJ found that these unintentional violations arose out of an innocent misunderstanding and miscommunication. These findings were based on the record evidence and the ALJ's credibility determinations, including findings based on demeanor. These findings should not be disturbed.

2. Legal Analysis.

a. The ALJ's Findings Are Not Irrelevant Because The General Counsel Has Argued They Prove Animus With Respect to the 8(a)(3) and 8(a)(5) Allegations.

The General Counsel argues the ALJ's findings on the motive should be disavowed because motive is irrelevant to 8(a)(1) violations. While this is true, and precisely why the ALJ sustained the 8(a)(1) allegations despite finding no animus or discriminatory intent, the General Counsel made these findings relevant by arguing, with respect to the 8(a)(3) and 8(a)(5) allegations, that these violations prove animus. In fact, the ALJ did not discuss his findings regarding motive in the sections in which he rendered the merit determination on the 8(a)(1) allegations; he only discussed these findings in the sections in which he denied the 8(a)(3) and 8(a)(5) allegations, *specifically in response to* the General Counsel's contention that these violations established a pattern of union animus.[24]

[24] ALJD, 19:9-13 (in discussing why there was no evidence of animus or discriminatory intent with respect to the 8(a)(3) allegation regarding the closure of the training room, the ALJ stated, "And while the previous surveillance in July violated Section 8(a)(1) of the Act under the Board's objective test, the evidence indicates that it was based, not

The General Counsel cannot have it both ways. She cannot claim the ALJ's findings regarding motive should be disavowed, but then rely on these violations to prove union animus and discriminatory intent. Because the General Counsel has argued these violations show union animus, the ALJ's findings should not be disavowed.

b. The ALJ's Findings Are Supported by Substantial Record Evidence.

The ALJ's findings on motive are well-supported credibility determinations that should not be overturned. ***It is undisputed*** that a supervisor told Martorana employees were calling the security guard racial epithets and harassing him, and when he called his general manager to seek guidance on what to do, he misunderstood the general manager's instructions, which precipitated the erroneous instruction and photographing. Tr., 1764:11-1770:6 (Martorana), 1866:13-1867:21 (Solis), 1629:5-1630:25 (Ramirez). Athens called three witnesses - Martorana, Solis and Ramirez – who all testified consistently on this issue, and *the General Counsel did not call any witnesses to refute the corroborating testimony of these three witnesses*.[25] *Id.* Accordingly, faced with this

on union animus, but on Zufall's report of a verbal altercation between the union representatives and Furquan, and on Martorana's misunderstanding of Solis' instruction about how to address it."); ALJD, 29:28-32 (in discussing why there was no evidence of animus or discriminatory intent with respect to the 8(a)(3) allegations regarding Michael Bermudez' legitimate termination, the ALJ stated, "And the only violations found (promulgating a rule prohibiting employees from talking to union representatives off property while wearing their company uniforms and photographing employees who did so) were committed at a different facility, by different supervisors or agents, and were unintentional, based on a misunderstanding of the assistant general manager's instructions."); ALJD, 35:6-9 (in discussing why there was no evidence of animus or discriminatory intent with respect to the 8(a)(3) allegation regarding Damien Weicks' legitimate discipline, the ALJ stated, "In support, the General Counsel again cites the Company's unfair labor practices at the other facilities. However, as discussed above…the few 8(a)(1) violations found at the Pacoima facility fail to establish the Company's animus under the circumstances."); ALJD 49:30-35 (in discussing why there was no evidence of bad faith bargaining, the ALJ stated, "Finally, there is no other substantial direct or circumstantial record evidence of bad faith or an intent to frustrate agreement. Contrary to the General Counsel, the evidence fails to establish that the Company 'engaged in a course of conduct at its yards designed to discourage pro-Union activity and interfere with [their statutory] rights.' (Br. 122). Rather, as found above, it establishes only that, over 6 months earlier, at one of the three facilities, the Company committed a few 8(a)(1) violations due to a miscommunication and misunderstanding…)

[25] The General Counsel argues Respondent has "no paper trail or other evidence to support that the misunderstanding occurred." The record evidence disproves this contention. As noted, both Solis and Ramirez corroborated Martorana's testimony. The testimony of three credible and corroborating witnesses is certainly evidence that this

undisputed testimony, ALJ Wedekind rendered credibility determinations based, *inter alia*, the demeanor, plausibility and consistency of these corroborating witnesses and found the testimony about the misunderstanding to be credible.

Also highly relevant to the credibility of the testimony about the misunderstanding is the fact that Athens never enforced this erroneous rule. If Athens harbored union animus, and truly intended to thwart union activity, it makes no sense why the rule was never enforced or why higher level management (Solis and Ramirez) immediately disavowed Martorana's actions and told him to tell the supervisor and security guard that he had made a mistake.[26]

Notwithstanding the credible, corroborating and undisputed testimony of these three witnesses, the General Counsel urges the Board to draw an adverse inference from the fact that the security guard subjected to the racial harassment did not testify. However, Athens presented ***two corroborating witnesses*** on this point, and it had no reason to call yet another corroborating witness when the General Counsel proffered absolutely no evidence this incident did not occur. ALJD, 10:23-25, fn. 22 ("[T]here is no other apparent reason revealed by the record why Martorana and Furquan would have taken the unusual and unprecedented actions they subsequently did that day.")

In fact, it was the General Counsel who failed to call readily available witnesses who would have presumably supported her position, and thus, an adverse inference should be drawn against the General Counsel, not Athens. *Property Resources Corp.*, 285 NLRB 1105, 1105, fn. 2 (1987)

misunderstanding occurred. Moreover, as ALJ Wedekind noted, "there is no evidence that Furquan had a practice of filing written security reports," thus, the lack of such a report is not evidence that the July 12 racial harassment did not occur. ALJD, 10:23-25, fn. 2.

[26] The General Counsel dishonestly argues Respondent took "zero action" to correct Martorana's mistake (*see* GC Brief, pp. 23-24). This is absolutely false. Both Solis and Ramirez told Martorana his actions were wrong and that he needed to ensure the erroneous rule was never enforced, which Martorana did, and the rule was in fact never enforced. Thus, while Athens' repudiating actions may not have been sufficient to avoid legal liability for the 8(a)(1) violations (*see* ALJD, 13:10-25), Athens certainly took action that effectively ensured Martorana understood he had made a mistake and that the rule was never enforced.

("An adverse inference is properly drawn regarding any matter about which a witness is likely to have knowledge if a party fails to call that witness to support its position and the witness may reasonably be assumed to be favorably disposed to the party.") Specifically, during her case in chief, the General Counsel submitted videos of the July 12 incident, and she called the individual who recorded the videos, Gilberto Lopez, as a witness to authenticate the videos, and she called other witnesses (*i.e.*, Jose Maldonado and Cslido Garcia) present at the Union's tent that day. Tr., 41:3-14 (Garcia) 155:4-7, 169:8-11 (J. Maldonado), 816:9-822:7 (Lopez). These witnesses would have heard the verbal altercation and abhorrent racial slurs, and the General Counsel could and should have recalled these witnesses on rebuttal to dispute Martorana's, Solis' and Ramirez' testimony, but she did not. This is a striking omission, particularly given that her failure to recall these witnesses on rebuttal meant that the corroborating testimony of Martorana, Solis and Ramirez went undisputed. Moreover, given that the testimony asserted the Union had issued reprehensible racist slurs, certainly if they had not, they would have wanted to deny it. The only reasonable inference to be drawn from the General Counsel's failure to recall these witnesses and the Union's failure to deny making racist comments is that they would have corroborated Martorana's testimony.

As an alternative to actual evidence, the General Counsel proffers the parties' pre-hearing pleadings to impeach Martorana's testimony. However, the federal rules of evidence unequivocally preclude admission of such extrinsic documents for impeachment purposes. FRE 608(b) ("[E]xtrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness."). Not surprisingly, the General Counsel fails to cite any authority to support her statutorily prohibited use of such documents – documents Martorana did not verify or have any hand in crafting.

Significantly, the General Counsel had an opportunity to cross examine Martorana, Solis and Ramirez, but her cross examination failed to discredit these witnesses' corroborating testimony about the miscommunication that precipitated the unintentional 8(a)(1) violations.[27] Even more significant, as noted above, the General Counsel failed to call available witnesses during her rebuttal case to dispute Martorana's, Solis' and Ramirez' testimony ***even though she called these very same witnesses to testify during her case-in-chief.*** The General Counsel cannot substitute irrelevant pre-hearing pleadings for actual evidence to support her completely speculative position.

In any event, the General Counsel certainly did not meet her high burden of establishing the ALJ's credibility determinations should be disturbed. The General Counsel must show a clear preponderance of the evidence demonstrates the ALJ's credibility determinations are incorrect. *Standard Dry Wall Products*, supra, 91 NLRB 544. She has failed to meet this burden. Not only does the General Counsel fail to point to any actual record evidence that undermines Judge Wedekind's findings, but she has also not explained why the clear preponderance of the evidence shows it was manifestly incorrect for ALJ Wedekind to credit the corroborating testimony of Martorana, Solis and Ramirez, particularly given the absence of contrary evidence. Given these circumstances, ALJ Wedekind's credibility-based findings should not be disturbed.

3. <u>It Is the General Counsel's Burden to Prove Animus, and the General Counsel Failed to Do So.</u>

The General Counsel's exceptions to the Judge's finding on motive are predicated on the her contention that "Respondent bore the burden of establishing this 'misunderstanding' defense." That is not true. It is *General Counsel's burden* to prove animus. The General Counsel did not

[27] Notably, the General Counsel did not attempt to question Martorana on cross examination about the documents with which she is now attempting to impeach him.

proffer any evidence that these 8(a)(1) violations indicate union animus other than the mere fact that these 8(a)(1) violations occurred. However, the mere occurrence of an 8(a)(1) violation does not prove animus. This is true even if the employer purportedly fails to prove the violation was not born out of animus. Accordingly, the General Counsel failed to failed to prove these 8(a)(1) violations were anything more than unintentional, isolated incidents caused by a miscommunication. Consequently, the Board should reject and dismiss the General Counsel's Exception 3, including 3(a)-3(l), and 4, including 4(a).

III. CONCLUSION.

As the foregoing facts and analysis demonstrate, the General Counsel has failed to establish any reasonable grounds for overturning the ALJ's factual and demeanor-based credibility findings, and none of her exceptions have merit. Accordingly, Athens respectfully requests that the General Counsels Exceptions 1 to 8 be dismissed and for the Board to adopt ALJ Wedekind's decision.

DATED: March 6, 2020

Respectfully submitted,

EPSTEIN, BECKER and GREEN, P.C.

By: _____

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My business address is 1925 Century Park East, Suite 500, Los Angeles, CA 90067-2506.
3. I served copies of the following documents *(specify the title of each document served)*:

RESPONDENT'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

4. I served the documents listed above in item 3 on the following persons at the addresses listed:

Counsel for the General Counsel	*Counsel for the International Brotherhood of Teamsters, Local 396*
Amanda W. Laufer Christina Flack National Labor Relations Board, Region 31 11500 W. Olympic Blvd., Ste. 600 Los Angeles, CA 90064 Tel: (310) 307-7337 Fax: (310) 235-7420 amanda.laufer@nlrb.gov Christine.Flack@nlrb.gob	Paul L. More David Barber Attorney at Law McCracken, Stemerman & Holsberry LLP 595 Market Street, Suite 800 San Francisco, CA 94105 pmore@msh.law; dbarber@msh.law

5.

a. ☐ **By e-mail or electronic transmission.** I caused the documents to be sent on the date shown below to the e-mail addresses of the persons listed in item 4. I did not receive within a reasonable time after the transmission any electronic message or other indication that the transmission was unsuccessful.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

1. I served the documents by the means described in item 5 on (*date*): **March 6, 2020**.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

3/6/20	Lynne Conner	*/s/ Lynne Conner*
DATE	(TYPE OR PRINT NAME)	(SIGNATURE OF DECLARANT)